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QUALIFIED RIGHTS OF ADDRESSEE IN LETTERS AS LITERARY PROPERTY.

In King et al. v. King, 168 Pac. 730, decided by Wyoming Supreme Court, the question was of the right of sender and addressee to restrain, by injunction, the publication of letters, which defendant clandestinely had obtained and used in a divorce suit.

In this case it appears that personal and private letters had been written by one of the plaintiffs to the other and defendant had used them as evidence in her divorce suit against such other plaintiff and at the conclusion of the case by agreement they were sealed up and placed in the custody of the clerk of the court. Afterwards dedendant in the proceeding at bar by her application to the court sought an order for the unsealing of said letters so as to use them in a proceeding before a lodge of a secret order. Temporary injunction was denied against granting of the order and this ruling was reversed by the Supreme Court of Wyoming.

In an early opinion by Judge Story it was ruled that the author of letters written and sent to another had exclusive copyright therein and could prevent publication thereof by addressee for his own benefit. It was said: "In short, the person to whom letters are addressed has but a limited right in special property (if I may so call it) in such letters, as a trustee or bailee, for particular purposes, either of information or of protection, or of support of his own rights and character."

This theory often has been ruled in later cases, a notable case on this line being that of Baker v. Libbie, 210 Mass. 599, 37 L. R. A. (N. S.) 944, in which the question of the publication of the private letters of Mrs. Eddy, the founder of Christian Science, was involved.

It was claimed that the use intended to be made of the letters came under a recognized exception justifying the use of the letters and was for the purpose of public justice. But the court said: "By no conception can it be claimed that the tribunals or rules adopted within the precincts of a secret organization could be considered for the purposes of public justice publicly administered according to the established institutions of the country."

While this view is sound, yet we greatly doubt that the exception would cover a case of a party seeking to use in a suit for vindication of his private rights in a court of justice such letters.

It might be that in a criminal prosecution they might be available as evidence. But where a civil action is tried, public justice should not override a third party's vested rights in seeking one's own rights.

The exception above stated admittedly is limited to cases where letters do not tend to criminate any person required by law to produce them for use as evidence. But this is on the theory that outside rights are in no wise to be jeopardized by one using judicial tribunal to secure justice for himself. His claim for this is a private or personal matter. It is not a matter of public justice that it be granted to him. It is matter of public justice only as the setting of a precedent in law, that procedure therefore be in due and regular course. Above all things a court of justice goes upon the principle that no vested right shall be taken away from another without his having his day in court. And it is said in the case considered that a sender of a letter does not relinquish his property therein. He only makes the addressee a bailee for a particular purpose.

NOTES OF IMPORTANT DECISIONS.

INDEMNITY INSURANCE — INTEREST AND COSTS IN APPEAL ADDED TO MAXIMUM INDEMNITY.—Ravenswood Hospital v. Maryland Casualty Co., 117 N. E. 485, decided by Supreme Court of Illinois, was a suit by an indemnitee to recover from indemnitor a sum exceeding the limit expressed in the policy, where the judgment was in excess of that limit and also the costs paid in taking an appeal and interest accumulated while it was pending.

In this case the defense had been taken in charge by indemnitor and after verdict, it insisted upon appeal being taken. Recovery was denied as to the excess as such, but was allowed as to the costs on appeal and the interest accruing until the case was affirmed by the Supreme Court.

As to the claim for the excess in recovery above the amount expressed in the policy, the policy is referred to as conclusive on this question. As to the other contention it was said: "In this case the obligation of appellant was to indemnify appellee against loss from liability imposed by law for damages on account of injury or death sustained by a patient," etc. Appellant further agreed that it would "at its own cost defend such suit" unless it should elect to pay appellee the amount of the policy. "What was meant by the phrase, 'at its own cost defend such suit?' Clearly that appellant would bear all the expenses incident to the defense of such action, no matter what their kind or nature. This was to be in addition to the $5,000 specified in the policy. * * * The perfecting of the appeal did not relieve appellee of liability for the loss as ascertained and fixed by the judgment, but only suspended its collection until such further time as the judgment of the lower court could be reviewed on the appeal. Pending the appeal and by reason thereof, costs and interest accrued. * * * Had appellant chosen to pay appellee the amount of its policy of $5,000, when that judgment was rendered, it would thereby have relieved itself from the expense incident to the appeal, and the appellee would have had the privilege of either using said amount to satisfy the judgment or in prosecuting its appeal. In either event, appellant would not have been liable for the interest on the $5,000 judgment pending the appeal. * * * But appellant did not choose to do this, but on the contrary insisted on the case being appealed to the Appellate Court. Under the terms of the policy, appellee was compelled to participate in the appeal or forfeit its rights under the policy." It is then stated that: "Interest on a judgment is as much an incident to expense in carrying a case to the Appelate Court as are the court costs."

The judgment affirmed shows that, not the interest on the entire judgment was allowed in favor of indemnitee, but only on the amount of $5,000. But it seems a little difficult to distinguish in this way. The compulsion on the indemnitee was to carry the judgment that had been rendered to the Appellate Court for review. If compulsion is to measure obligation of indemnitor, the judgment is not divisible in indemnitor's favor. Indemnitee could not settle partially with the plaintiff, in whose favor the judgment had been rendered. At all events, however, the ruling is quite salutary on the question of interest accruing on appeal. Possibly, the principle ought to be extended in the obtaining a new trial at indemnitor's demand, and a second trial resulting in an increased recovery.

BILLS AND NOTES—NOTE PAYABLE TO MAKER'S OWN ORDER AND NOT INDORSED.—In Moore v. Cary, 197 S. W. 1093, decided by Tennessee Supreme Court, a promissory note was signed by two parties as makers and made payable to the order of one of them. The names of the signers were Moore and Cary, and it was claimed that as the same person cannot be both maker and payee, the name of Moore must be treated as a nullity, the note being sued on by alleged holder, with no indorsement of Moore thereon.

The court said: "It is true that the same person cannot be both maker and payee, nothing else appearing. However, as pointed out by Mr. Daniel in his valuable work on Negotiable Instruments, the execution of such instruments is very common in England and in this country, the paper being ineffective until indorsed, but on being indorsed becoming a note payable to bearer. The learned writer says: "They are designed to enable the holder to use them without indorsement, and are simply roundabout notes payable to bearer.' The same principle is recognized in the Negotiable Instruments Law, § 8, wherein it is provided that such an instrument may be drawn payable to the order of the drawer or maker. But in the same law it is provided that such a paper is not complete until it is indorsed by the payee. There is, however, nothing written on the back of any of the papers which Moore appears to have signed, and those must be treated as incomplete in which his name appears as payee and apparently as maker also,

unless it can be determined, that Moore wrote his name on the face, intending thereby to become an indorser. * * * Now, we must suppose that E. H. Moore placed his name upon the papers mentioned with the purpose of being bound. The only way he could be bound under the facts stated, was as indorser, and we must conclude that he intended to so bind himself."

The court referred to rulings to the effect, that on the back of the paper an indorser's name generally appeared. Daniel says it is unusual and irregular for it to appear elsewhere, but Lord Campbell said it "was quite immaterial whether this was on the back or on the face of the instrument."

Of course, if indorsement does appear on face, it is not only unusual, but where the position of the name is such that the instrument appears no instrument at all, unless it is counted as that of maker, the court could not say that at inception, at least, he could not be bound except as indorser. In this case there were two apparently signing as makers and this fact gives some basis for the court saying that only the other might be held as maker, and Moore only as indorser.

EMPLOYES ENGAGED IN INTERSTATE COMMERCE AS DECLARED BY THE UNITED STATES SUPREME COURT.

Introductory.—Numerous cases arising under the Federal Employers' Liability Act present a very close question as to whether or not the plaintiff employe was engaged in interstate commerce at the time he suffered injury. As this question is primarily one of fact, each case must be decided in the light of the particular facts.

In cases in which there is room for doubt, the test is, was the act of the employe so directly and immediately connected with the business of interstate commerce as substantially to form a part or a necessary incident thereof?[1]

Or, as stated by the Court, in cases decided by it, "Was the employe, at the time of the injury, engaged in interstate transportation or in work so closely related to it as to be practically part of it?"[2]

Most railroad tracks are used in both interstate and intrastate commerce, but when so used they are none the less instrumentalities of the former. Nor does such double use prevent the employment of those who are engaged in keeping such tracks in suitable condition for use from being an employment in interstate commerce.[3]

Decisions of the United States Supreme Court, and especially recent decisions of that Court, tend greatly to clarify the vexing question of employment in interstate commerce. We learn from them that the solution of the question depends upon the circumstances at the very time in question, not upon those theretofore existing, except in so far as what has gone before sheds light upon the status of affairs at that time, nor upon contingencies of the future. In this respect, however, there is a marked difference between depending upon mere expectation or the contingency that acts will follow which will serve to fix the character of acts presently done, and doing an act for the purpose of furthering a movement which will be in interstate commerce. In the latter event the whole course of conduct is in interstate commerce.

We learn, too, the distinction between work of repair on an instrumentality which has been entirely withdrawn from all commerce for the purpose of being repaired, and work on one which has momentarily been halted in its course to receive needed repairs, after which it continues on its journey, the character of which is not altered by the slight interruption.

(1) New York Cent. & H. R. R. Co. v. Carr, 238 U. S. 260, 9 N. C. C. A. 1, aff'g 158 App. Div. (N. Y.) 891.

(2) Shanks v. Delaware, L. & W. R. Co., 239 U. S. 556, 558, 60 L. ed. 436; New York Cent. R. Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 13 N. C. C. A. 943.

(3) Pedersen v. Delaware, L. & W. R. Co., 229 U. S. 146, 3 N. C. C. A. 779, 57 L. ed. 1125, Ann. Cas. 1914C 153, rev'g 197 Fed. 537, 117 C. C. A. 33.

Some of these decisions overrule many decisions of the state courts, and are thereby rendered doubly important.

Repairing Engine Temporarily Withdrawn from Service.—A distinction is drawn between work on an engine which has been temporarily withdrawn from service, and one which is stopped temporarily in interstate commerce to receive repairs, after which it continues on its way. So, too, a difference is noted between the status of the engine first mentioned and a roadbed which is permanently devoted to interstate traffic, although it may also be engaged in carrying intrastate traffic.

The plaintiff was injured while engaged in repairing an engine. The engine "had been used in the hauling of freight trains over defendant's line, which freight trains hauled both intrastate and interstate commerce, and it was so used after the plaintiff's injury." Three days before the accident the engine was used to pull a train, and it was likewise used on the day of the accident, after the happening thereof. It was held that the plaintiff was not engaged in interstate commerce.

In this case the Court said: "This is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine as such is not permanently devoted to any kind of traffic and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time not upon remote probabilities or upon accidental later events."[4]

(4) Minneapolis & St. L. R. Co. v. Winters, 242 U. S. 353, 13 N. C. C. A. 1127.

Car Stopped Temporarily for Repairs.—A car containing an interstate shipment, stopped for repairs before it reaches its destination, its cargo not being ready to deliver to the consignees, is held to be still engaged in interstate commerce. "The plaintiff in error claims that it was not, and was laid by for repairs. But we are inclined to think otherwise. Its cargo had not yet reached its destination and was not then ready for the delivery to the consignee, wherewith the commerce would have ended. Its stoppage in the yard was an incident to the transportation. The injury to the coupler was one easily repaired without being taken to a repair shop, and was being hauled upon its tracks when the accident occurred."[5]

Switching Intrastate Car from Train Carrying Interstate Freight.—Plaintiff, a brakeman, was injured while setting out an intrastate car from a train which also carried interstate goods; the car being still attached to the engine when the injury occurred. Held, that he was engaged in interstate commerce. In part, the Court said:

"The plaintiff was a brakeman on an interstate train. As such, it was a part of his duty to assist in the switching, backing and uncoupling of the two cars so that they might be left on a siding in order that the interstate train might proceed on its journey. In performing this duty it was necessary to set the brake of the car still attached to the interstate engine, so that, when uncoupled, the latter might return to the interstate trains and proceed with it, with plaintiff and the other interstate employes, on its interstate journey."[6]

Switching Interstate Car in Breaking Up Train in Yards.—The plaintiff was a switch foreman and was breaking up a train that had come into his state from another state. At the moment when he was hurt he had

(5) Delk v. St. Louis & S. F. R. Co., 220 U. S. 580.

(6) New York Cent. & H. R. R. Co. v. Carr, 238 U. S. 260, 9 N. C. C. A. 1, aff'g 158 App. Div. (N. Y.) 891.

three cars attached to the engine; the rear one consigned to Duluth, and to be switched to another track; the next consigned to Minneapolis; both loaded. The coupler on the Minneapolis car was out of order, and there was evidence that it had been marked for repairs and was to be switched to the repair track before going farther. Plaintiff was injured while uncoupling the cars, the injury being due to the defective coupler. The defendant argued that the car had been withdrawn from interstate commerce; that the Safety Appliance Act required it to remove the car for repairs, and that its effort to comply with the statute could not constitute a tort; and that the plaintiff was the person entrusted by it with the details of the removal and could not make it responsible for the mode in which his duty was carried out. It appeared, however, that the car, without being unloaded, was carried to Minneapolis the next day. It was held that the plaintiff was engaged in interstate commerce at the time of his injury, and entitled to recover under the Employers' Liability Act. Speaking of the car in question, the Court, in part, said:

"It had not been withdrawn from interstate commerce, but merely subjected to a delay in carrying it to its destination. At the moment of the accident it was accessory to switching the Duluth car. It does not seem to us to need extended argument to show that the car still was subject to the Act of Congress."[7]

Switching Interstate Cars in Yard Before Reaching Destination.—The plaintiff was employed as a switchman in the defendant's yards. Two loaded coal cars coming from without the state were received in the yards. They were destined to a private track connecting with the yards, and acting under instructions plaintiff commenced the switching movement requisite to place them on such track. There was evidence tending to show that in order to complete this movement it became necessary to uncouple the engine from the loaded cars and with it to remove two empty ones from the private track. While engaged in removing the empty cars, plaintiff was injured. It was held that the trial court properly submitted to the jury the question whether or not the plaintiff was engaged in interstate commerce, and a finding in the affirmative was sustained.[8]

Moving Intrastate Cars from Point to Point in Same City.—One employed on a switch engine in moving a number of cars, all loaded with intrastate freight, from one point in a city to another point in the same city, is not engaged in interstate commerce.

"That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."[9]

On Way to Boarding House After Preparing Engine to Haul Empty Cars.—Deceased, a locomotive fireman, after inspecting, oiling, firing, and preparing his engine for starting on a trip to another state, but before the engine had been attached to any of the cars of the train, attempted to cross certain tracks which intervened between the engine and his boarding-house, and was struck and killed by an engine running on one of said tracks. There was some contention that the cars making up the train to be hauled were empty; this because their contents were not proved. It was held that deceased was employed in interstate commerce at the time he was struck and killed. The court held that the hauling of empty cars from one state to another is interstate commerce. On the question whether deceased was still engaged in interstate commerce while going to his boarding-house, the Court said:

(7) Great Northern R. Co. v. Otos, 239 U. S. 349.

(8) Pennsylvania Co. v. Donant, 239 U. S. 50, aff'g 224 Fed. 1021.

(9) Illinois Cent. R. Co. v. Behrens, 233 U. S. 473.

"Assuming (what is not clear) that the evidence fairly tended to indicate the boarding-house as his destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just prepared his engine for the purpose, and that he had gone beyond the limits of the railroad yard when he was struck. There is nothing to indicate that this brief visit to the boarding-house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still 'on duty,' and employed in commerce, notwithstanding his temporary absence from the engine."[10]

Engineer on Way to Inspect Engine Before Making Run.—The deceased, engineer of an interstate train, finished one-way of his run, left his engine in the yard near the roundhouse, was detained in the yards for a time, went to the boarding house patronized by the railroad men, found it full, and went back to the roundhouse, into an engine, and went to sleep. He was due to take his regular run at 6:10 the following morning. About 4:30 the next morning the engine in which he was sleeping was run out of the roundhouse, down to a coal chute, to be supplied with coal, water, etc., for its trip. Deceased waked at the chute, got off the engine, inquired where his engine was to be found, was informed as to its location, and then started in that direction.

That was the last seen of him alive. Later he was found in an open, uncovered pit in the roundhouse, dead. His engine had been standing with the step over the pit, which was over eight feet deep, and was unlighted. It was held by the State Court that deceased was engaged in interstate commerce at the time he met his death, and this decision was affirmed by the United States Supreme Court.

In its opinion, the State Supreme Court said: "The exact question is: For what purpose did Padgett (deceased) go into the roundhouse? If he went there for any purpose of his own, or there is an utter failure of evidence to prove any circumstance from which his purpose can be inferred, then the verdict ought to have been directed. There was evidence to show that, when the engine came into the yard that night, it had a hot box and needed repairs; that the rule required the engineer to inspect his engine only about an half hour before the leaving time. There was no intimation that he was forbidden to inspect it before. There was evidence that, if the inspection was made at the required hour and it was found that the repairs had not been made or improperly made, then the engine would have to be returned to the roundhouse to have the repairs properly made; that the repairs would take time, and the time necessary would have to be taken even if it delayed the departure of his train. The evidence is circumstantial, but conclusions may be drawn from circumstances. * * * Of course, he had a right, under the rules to loaf around until the exact minute that the rule required him to take his engine, and if error had occurred in the mechanical department, he had the right to send the engine back and delay the train. Would a faithful servant be likely to do that? That was a question for the jury. Would a man recently promoted stand upon the strict letter of the rule?"[11]

Mining Coal to be Used in Interstate Commerce.—The fact that the coal which an employe is engaged in mining is to be used in interstate commerce after being transported does not make his employment one in such commerce. "The injury happening when plaintiff was preparing to mine the coal was not an injury happening in interstate commerce, and the defendant was not then carrying on interstate commerce,

(10) North Carolina R. Co. v. Zachary, 232 U. S. 248, 9 N. C. C. A. 109, Ann. Cas. 1914C 159, rev'g 156 N. C. 496.

(11) Seaboard Air Line Ry. v. Padgett, 236 U. S. 668, aff'g S. C., 83 S. E. 633.

facts essential to recovery under the Employers' Liability Act."[12]

Wheeling Coal to Heat Shop Where Interstate Cars Are Repaired.—An employe of the defendant was injured while wheeling coal to heat the shop in which other employes were engaged in repairing cars that had been and were to be used in interstate commerce. It was held by the State Court that the employe was employed in interstate commerce. In part, the State Court said: "That the men engaged in repairing the cars were employed in interstate commerce is well settled. That an employe carrying materials to the shop to be used in repairing the cars would be employed in interstate commerce the Pedersen case decides. It seems no extension of the construction thus given to the statute to hold that an employe carrying coal for use in heating the shop where the repairs were made is employed in interstate commerce. The repairs could not be made unless the shop was heated. It is not material what our own views are on the proper construction of the federal statute. We are bound by the decisions of the Supreme Court of the United States."

The last mentioned Court, however, reversed the state Court, holding that the employe was not engaged in interstate commerce.[13]

Switching Coal to be Used in Interstate Engines.—At the time of the death of deceased, he was engaged in switching coal, belonging to defendant, from a storage track to a coal shed, where it was to be placed in bins or chutes and supplied, as needed, to locomotives engaged indiscriminately in intrastate and interstate commerce. Held, that he was not engaged in interstate commerce. "It is not important whether he had previously been engaged in interstate commerce, or that it was contemplated that he would be so engaged after his immediate duty had been performed. That duty was solely in connection with the removal of the coal from the storage tracks to the coal shed, or chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use."[14]

Guarding Material to be Used in Construction of Interstate Road.—One employed by a railroad company as night watchman to guard tools and material intended to be used in the construction of a new station and new tracks forming an interstate railroad, was not engaged in interstate commerce. "Decedent's work bore no direct relation to interstate transportation, and had to do solely with construction work."[15]

Carrying Bolts to Repair Bridge.—The plaintiff and another employe, acting under a foreman, were carrying from a tool car to a bridge some bolts, which were to be used by them that night or very early the next morning in repairing the bridge. The bridge could be reached only by passing over an intervening temporary bridge. Both bridges were being regularly used in both intrastate and interstate commerce. While plaintiff was carrying a sack of bolts over the temporary bridge, on his way to the bridge which was to be repaired, he was run down and injured by an intrastate train. Held, that the plaintiff was injured while engaged in interstate commerce, and, hence, that he was entitled to the protection of the Federal Employers' Liability Act.

The following portion of the Court's opinion in this case is of great value: "Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected

(12) Delaware, L. & W. R. Co. v. Yurkonis, 238 U. S. 439, 59 L. ed. 1397.

(13) Illinois Cent. R. Co. v. Cousins, 241 U. S. 641, 60 L. ed. 1216, rev'g 126 Minn. 172, 6 N. C. C. A. 182.

(14) Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 60 L. ed. 941, 11 N. C. C. A., 992, aff'g Mo. App., 180 S. W. 443.

(15) New York Cent. R. Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 13 N. C. C. A. 943, aff'g 216 N. Y. 563.

therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct any defect or insufficiency in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharfs, or other equipment used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test is: Is the work in question a part of the interstate commerce in which the carrier is engaged? Of course, we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

The Court further held that it was of no consequence that the men had not commenced the actual work of repair, but were only making things ready for such work. "It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce."[16]

Altering Machinery in Repair Shop.—An employe of a railroad company, which was engaged in both interstate and intrastate transportation, was injured while engaged in the work of taking down and putting into a new location an overhead counter-shaft, through which power was communicated to some of the machinery used in repair work. It was held that such employe was not engaged in interstate commerce.

Said the Court in this case: "Coming now to apply the test to the case in hand, it is plain that Shanks was not employed in interstate transportation, or in repairing or keeping in usable condition a roadbed, bridge, engine, car or other instrument then in use in such transportation. What he was doing was altering the location of a fixture in a machine shop. The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines some of which were used in such transportation. This, we think, demonstrates that the work in which Shanks was engaged was too remote from interstate transportation to be practically a part of it."[17]

Painting Engines and Cars.—The plaintiff was employed by defendant, and at the time of his injury was spraying paint on engines and cars by means of a "paint gun."

The machine in question was operated by means of air pressure, which caused the air about the operator to become heavily

(16) Pedersen v. Delaware, L. & W. R. Co., 229 U. S. 146, 3 N. C. C. A. 779, 57 L. ed. 1125, Ann. Cas. 1914C 153, rev'g 197 Fed. 537, 117 C. C. A. 33.

(17) Shanks v. Delaware, L. & W. R. Co., 239 U. S. 556, 60 L. ed. 436, L. R. A. 1916C 797, aff'g 214 N. Y. 413.

laden with paint, in the form of mist. It was breathing this paint-laden air that caused the injury complained of. The Court of Appeals of Maryland held that, as the engines and cars were used in interstate commerce, and as it was the duty of the defendant to keep them in safe condition and proper repair, the plaintiff's work had a reasonable and substantial relation to interstate commerce, in which commerce, it therefore concluded, he was engaged at the time of receiving his injury. This decision was reversed by the United States Supreme Court on authority of Delaware, L. & W. R. Co. v. Yurkonis, Shanks v. Delaware, L. & W. R. Co., etc., all of which cases are treated in this article.[18]

Constructing Tunnel.—One engaged in the construction of a tunnel, which, when completed, was intended to be used by the employer to shorten its line of railroad over which it transported both intrastate and interstate commerce, was not engaged in interstate commerce. In distinguishing this case from the Pederson case, the Circuit Court of Appeals said: "We think there is a clear distinction between the facts in that case and those in the case at bar. The plaintiff in error here was engaged in constructing a new instrumentality. When completed it was intended to be used in interstate commerce, but as yet it was no part of the railroad line of the defendant in error, and it had not become an instrumentality in interstate commerce."

The Court mentioned the similarity of this case and that of Bravis v. Chicago, M. & St. P. R. R. Co. (a Circuit Court of Appeals case reported in 217 Fed. 234, 133 C. C. A. 228), in which it appeared that the employe in question was engaged in the construction of a bridge 600 feet distant from the railroad on a cut-off more than a mile in length, and which had never been provided with rails or used as a railroad; it being the intention to use the bridge for the transportation of interstate commerce when the cut-off was finished. In that case the Court declared that the mere fact that it was the purpose and intention so to use it at some future time did not make it an instrumentality of interstate commerce.[19]

Taking Numbers of and Sealing Cars.—One employed as a yard clerk, and whose duties were to examine incoming and outgoing trains and make a record of the numbers and initials on the cars, to inspect and make a record of the seals on the car doors, to check the cars with the conductor's lists, and put cards or labels on the cars to guide switching crews in breaking up incoming, and making up outgoing, trains, some of the cars being intrastate and some interstate, was engaged directly in interstate commerce while on his way to meet an incoming train containing interstate freight. "The interstate transportation was not ended merely because that yard was a terminal for that train, nor even if the cars were not going to points beyond. Whether they were going farther or were to stop at that station, it still was necessary that the train be broken up and the cars taken to the appropriate tracks for making up outgoing trains or for unloading or delivering freight, and this was as much a part of the interstate transportation as was the movement across the state line."[20]

Dining Car Waiting on Siding for Train.—A dining car regularly employed in interstate commerce between San Francisco and Ogden was attached to an eastbound train, which was so late that the car could not reach Ogden in time to return on the next westbound train according to intention, and it was therefore dropped off at Promontory to be picked up by that train when it came along that evening. The car contained no passengers, but was stocked for the return. It was held that the car was

(18) Baltimore & O. R. Co. v. Branson, 242 U. S. 623, rev'g 128 Md. 678.

(19) Raymond v. Chicago, M. & St. P. R. Co., 243 U. S. —, 61 L. ed. —, aff'g 233 Fed. 239, 147 C. C. A. 245.

(20) St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, rev'g Tex. Civ. App., 148 S. W. 1099, 3 N. C. C. A. 800.

in interstate commerce while waiting to be picked up by the westbound train. In referring to certain cases cited by the defendant, the Court said: "The distinction between merchandise which may become an article of interstate commerce, or may not, and an instrument regularly used in moving interstate commerce, which has stopped temporarily in making its trip between two points in different states, renders this and like cases inapplicable. Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train."[21]

Transporting Logs to Place of Shipment.—One employed on a logging railroad, the owner of which carries its own logs in its own cars from its own timber land in the state to a tidewater point, also within the state, where the logs were dumped into the water, some of them going beyond the state, was not engaged in interstate commerce. Quoting from other cases, the Court said:

"When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state.

"But this movement (interstate movement) does not begin until the articles have shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence, is no part of that journey. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state."[22]

Moving New Outhouse to Take Place of Old.—A crew transporting a new outhouse to a depot already in use on an interstate railroad, for the purpose of installing it to take the place of an old one previously erected at such depot, was held by the Supreme Court of Minnesota to be engaged in interstate commerce. Said the State Court: "The old outhouse, for which the one in question was to be substituted, was a mere appendage to defendant's station building or depot. This depot was used in interstate commerce; and replacing the old closet by a new one was rather in the nature of repairs to the station accommodations provided for the use of the traveling public, than the installation and erection of a new and independent structure." However, this decision was reversed by the United States Supreme Court on authority of Delaware, L. & W. R. Co. v. Yurkonis, and other cases contained in this article.[23]

Yard Conductor on Way to Receive Orders.—One employed as yard conductor by an interstate railroad, having executed all of his orders, rode on a freight engine on his way to report to the yardmaster for further orders, and who was injured in alighting from the engine, was not injured while engaged in interstate commerce, regardless of the nature of the work the orders he would have received would have required of him.[24]

Clearing Track of Wreckage.—An employe who was injured while clearing up a

(21) Johnson v. Southern Pacific Co., 196 U. S. 1, 59 L. ed. 363.

(22) McCluskey v. Marysville & N. R. Co., 37 Sup. Ct. 374, quoting from Coe v. Errol, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. ed. 715, and The Daniel Ball, 10 Wall. 557, 19 L. ed. 999. Another case involving the same question and decided accordingly is, Bay v. Merrill & Ring Logging Co., 37 Sup. Ct. 376.

(23) Minneapolis & St. L. R. Co. v. Nash, 242 U. S. 619, 61 L. ed. —, rev'g 131 Minn. 166, 154 N. W. 957.

(24) Erie R. Co. v. Welsh, 37 Sup. Ct. 116.

wreck which blocked the movement of interstate trains, was employed in interstate commerce.[25]

C. P. BERRY.

St. Louis, Mo.

(25) Southern R. Co. v. Puckett, 37 Sup. Ct. 703.

STATUTE OF FRAUDS—PROMISE VALID WHERE MADE.

BARBOUR v. CAMPBELL.

Supreme Court of Kansas. Nov. 10, 1917

168 Pac. 879.

(Syllabus by the Court.)

The statute of frauds declares the public policy of this state to be that, unless a promise of one person to pay the debt of another is in writing and signed by the promisor, an action on that promise cannot be maintained in a Kansas court, although the contract may be valid in the state where it was executed.

DAWSON, J. The principal question presented in this appeal is controlled by the statute of frauds. The plaintiff is the divorced wife of the late Webster S. Barbour of Boise, Idaho. The defendant is his daughter. The plaintiff sued the defendant in the district court of Wyandotte county, Kan., upon an oral promise of the defendant to pay the plaintiff for services rendered by her to defendant's father during his last sickness. Plaintiff's deposition recites the facts relied upon to establish her cause of action:

"Mr. Barbour was very bad, and I did not feel like leaving him, so while my sister was there he called Mrs. Campbell to his bedside and said to her, 'Maude, I have agreed to pay Willie $500 for nursing and caring for me and for her expenses, and I want you in case I die to pay her this amount, saying if you will pay her that it will avoid my doing so and I will leave my estate to Lou and you.' She said, 'You can depend on me, father; I will pay her.' He again said, 'Now Maude, you will do this, won't you?' and she said, 'Yes, father, I will.' And he said, 'You know she has been kind, taking good care of me and done things for me that no one else would or could do' and she said, 'Yes, I know she has, and if the amount had been a thousand dollars I would pay her willingly.'"

(1.) The defendant prevailed below, and the plaintiff assigns and argues many errors, but a consideration of our statute for the prevention of frauds and perjuries may solve the whole problem. Section 6, in part, reads:

"No action shall be brought whereby to charge a party upon any special promise to answer for the debt, default or miscarriage of another person; * * * unless the agreement on which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized in writing." Gen. Stat. 1915, § 4889.

Observe the language of the statute. It says no such action shall be brought. It does not say such a promise is illegal. It does not declare such a contract void. It merely withholds a remedy. It declares that the courts of this state may not be used to enforce such promises or such contracts. The title of the act declares its purpose, "An act for the prevention of frauds and perjuries." The act proceeds on the theory that to countenance such an action would open the door to all manner of frauds and encourage the baldest sort of perjury. The act announces the public policy of this state. Every lawyer, every judge, every critical observer, knows that the greatest blight on the administration of justice is the persistent and ever-recurring perpetration of perjury, and a statute plainly designed to limit opportunities for perjury must not be frittered away with specious refinements and exceptions.

(2.) Plaintiff pleaded the Idaho statute of frauds, and offered proof that the defendant's oral promise to pay her father's debt did not fall within the ban of the Idaho statute, and that it would be enforceable in that state. Ordinarily a contract which is valid where made is valid everywhere, but there is a well-known exception to that rule. Briefly stated, the exception is that, where the contract contravenes the settled public policy of the state whose tribunal is invoked to enforce the contract an action on that contract will not be entertained. Third National Bank of New York v. Steel, 129 Mich. 434, 88 N. W. 1056, 64 L. R. A. 119; Heaton v. Eldridge & Higgins, 56 Ohio St. 87, 46 N. E. 638, 36 L. R. A. 817, 60 Am. St. Rep. 737; Conley's Constitutional Limitations (7th Ed.) p. 178; 9 Cyc. 674-677; 5 R. C. L. 917, 918, 944, 945.

In Wharton on the Conflict of Laws, vol. 2 (3rd Ed.) 1442, it is said:

"Statutes directing that no suit shall be sustained, in certain classes of cases, except on written testimony, are based on moral grounds. Their object, as is shown by the title of that

which served as the pattern of all others, is to prevent fraud and perjury. Here, then, comes into play the position on which Savigny lays such great stress—that moral laws, or laws to effect moral ends, which are imposed by particular states, are peremptory and coercive, and are to be taken as rules of procedure by the judges of such states. It is true that Judge Story opposes to such a conclusion his great authority. He maintains that where parol contracts are good by the law of the place where they are made, they may be enforced in countries where they would, if there executed, be barred by the statute of frauds; and he cites a number of cases to this point, 'none of which,' his editor, Judge Redfield, states, 'seem to adopt the views he here intimates.' But it may now be regarded as settled that where the statute of frauds provides, in a particular state, that no suit shall be maintained on a particular contract unless it be in writing, the lex fori, in such case, is absolute, and applies to a foreign contract good by the law of the place of its solemnization."

This view renders it unnecessary to consider the other errors assigned. The judgment is affirmed. All the Justices concurring.

NOTE.—*Enforceability in Another State of Contract There Within Statute of Frauds.*—The instant case held that as the Kansas statute forbids its courts to enforce such a contract as was there involved, the public policy of Kansas as declared by its statute forbidding enforcement by its courts. It is not said, that enforceability is a question of *lex fori*—that is to say law of remedy. By the instant case it is merely ruled that comity cannot be invoked. This is equivalent to saying that the court did not think that the *lex loci* would have denied plaintiff his remedy.

In Callaway v. Prettyman, 218 Pa. 293, 67 Atl. 418, the contract sued on was in regard to land in New Jersey. It was invalid so far as the law of that state was concerned. But by Pennsylvania statute it was a valid contract. It was held plaintiff had a right of action though the contract concerned the sale of land in the former state, the *lex loci contractus*, and not the *lex rei sitae*, controlling. But the statute of New Jersey only incidentally referred to the land. It provided that brokers' contracts regarding land should not be valid unless they were licensed. To the same effect is Hatton v. Morton, 13 Ga. App. 469, 79 S. E. 371; Exchange Bank v. McMillan, 76 S. C. 561, 57 S. E. 630, and Howell v. North, 93 Neb. 405, 140 N. W. 779.

In Murdock v. Calgary Col. Co., 193 Ill. App. 295, there was suit on a contract for payments on a sale of land in Canada. There the suit was not maintainable under rule under Statute of Frauds. But it was contended that this merely affected the remedy and the *lex fori* applied. But the court said: "The clear weight of authority is to the effect that Statute of Frauds affects the obligation and the validity of contracts and that hence the *lex loci contractus* applies and controls."

In Edwards v. Kenzey, 96 U. S. 595, it was said: "The laws which subsist at time and place of making a contract enter into and form a part of it," and "the obligation of a contract includes everything within its obligatory scope" and "among these elements nothing is more important than the means of enforcement."

Also it was ruled in Miller v. Wilson, 146 Ill. 523, that the *lex loci contractus* embraces both the obligation and the remedy. See also Burr v. Beckler, 264 Ill. 230.

Third Natl. Bank v. Steel, 129 Mich. 434, 88 N. W. 1050, 64 L. R. A. 119, decides as does the instant case, but it is purely on the ground that the *lex fori* applies. The court said: "The question involved was whether a contract valid in the state where it was entered into could be enforced in this state" in view of the statute regarding non-enforceability under statute of frauds section. It was held that the rule of the *lex fori* governed.

It seems to us that the distinction spoken of in Illinois and U. S. Supreme Court cases ought to govern. In the first place, either common or statute law of a state has no extra territorial operation and in the second place, it does not seem, that there is public policy involved in such a statute so as to cut out any rule of comity. It is not in the way of condemnation of consideration of a contract, that it is unenforceable. It only means, that regarding contracts within reach of the statute they are not enforceable in the courts of a state. But if our view is the correct one, why is not a contract sued on within statutory time of its making enforceable in another state, notwithstanding that by the law of the forum it has become barred? C.

JETSAN AND FLOTSAM.

AMERICANITIS.

The Century Dictionary defines "Americanitis" as an "overwhelming national conceit of the United States especially when shown or expressed by vulgar brag or noisy braggadocio."

This definition aptly characterizes a featured article of our contemporary, Case and Comment, for September, 1917, which goes under the rather misconceived heading, "Americanism."

"Americanism" is defined by Webster as being a "custom peculiar to the United States; an American characteristic or idea; a word or phrase peculiar to the United States."

Under this term of reproach signifying "peculiarity" and "provincialism" in the use of words or ideas, the writer, Hon. Barton E. Sweet, delivers himself of many ridiculous, inaccurate and boastful expressions concerning the exclusiveness and supremacy of American ideals.

"Americanism," says Mr. Sweet, "is one of the grandest words in the English language. It

has become symbolical of civil and religious liberty on the western continent. It represents the shining goal toward which the human race has been tending since time began."

If the term Americanism, hitherto regarded as one of condescension, if not of derision, has in it the wide range of signification here claimed for it in Mr. Sweet's opening paragraph, our great dictionaries require immediate revision.

Elaborating still further an idea that had already overflowed its narrow banks, Mr. Sweet goes on to say:

"We find epitomized in it the struggles, the hopes, the dreams, and the aspirations of man for better days and better things, since the time when he cringed and crawled in the dens and caverns of barbarism, and groped and felt his way through the long night of the stagnant centuries toward the dawn of a grander day, up to the present hour, when we behold him revealed, standing upright, with the sunlight of heaven in his face, or walking with uncovered head beneath the silent stars, contemplating as to the handiwork of the Creator and the betterment of the human race."

Historically, America is the product of the centuries, but she is not the only flower of historical evolution. Greece and Rome developed civilizations in many respects as wonderful as our own, and the world is still acknowledging its unpaid debt to Roman civilization for developing legal principles to a point hardly yet reached either in America or in any other modern nation.

Nor can our own history be separated from the struggles of our English progenitors. Magna Charta gave us our Constitution and the development of the representative idea in government is English rather than American.

Surely we can be patriotic and intellectually honest at the same time. We can show our love for our country without being ridiculous or provincial in doing it.

Possibly with the extreme generosity of Americans we are ready in all such instances to let the spirit in which a thing is done excuse the manner in which it is done. But it seems to us that if ever the scientific spirit is to pervade the thinking of lawyers to a greater degree than it has in the past such loose expressions ought not to be featured in our legal periodicals.

HUMOR OF THE LAW.

Judge Orrin N. Carter, of Chicago says that the general public regards the decisions of courts about as expressed in the following:

"If any 't' shall not be crossed
Or any dot of 'i' be lost,
The grave omissions then shall be
Enough to set defendant free.
So here we have the law; and see
Here is a naked uncrossed 't'!"

Sir John Kirk, who recently celebrated his fiftieth anniversary of work in connection with the Ragged School Union, tells an amusing anecdote of how he once questioned a London waif whom he had befriended as to his method of earning a living.

The young fellow's reply was typical of the London street arab.

"Well, guv'nor," he said, "it's like this. I picks strawberries in the summer, I picks 'ops in the autumn, in the winter I picks pockets, and as a rule, I'm pickin' oakum for the rest of the year."—St. Louis Star.

Hon. John B. Knox, of Alabama, in an address before the Tennessee Bar Association, said of Andrew Jackson:

"A favorite boast of Jackson's was that his feet 'had never pressed foreign soil;' that, 'born and reared in the United States, he had never been out of the country.' It is recorded that he, one day, made this exultant observation in the presence of Mrs. Eaton, whose Irish wit prompted her to enquire, 'But how about Florida, General?'

"'That's so. I did go to Florida when it was a foreign country, but I had quite forgotten that fact when I made the remark.'

"'I expect, General, you forgot that Florida was foreign when you made the trip?'

"The General was put *hors de combat* for a moment, but soon rallied. 'Yes, yes, maybe so. Some weak-kneed people in our own country seemed to think so.'

"'Oh, well, General, never mind. Florida didn't stay foreign long after you had been there!'

"This was one of his favorite anecdotes for the rest of his life. Whenever he related it, he would add: 'Smartest little woman in America, sir; by all odds, the smartest.!'"

WEEKLY DIGEST

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1. **Animals** — Promulgating Rules. — Since Tick Eradication Act prescribes no form for promulgation of regulations by board of control of Agricultural Experiment Station, any public act of board in promulgating regulations in manner calculated to convey information to public constitutes promulgation.—Cazort v. State, Ark., 198 S. W. 103.

2. **Attachment**—Mitigation of Damages. — Where one procures an order dissolving a wrongful attachment and for return of property, and then permits ti to be taken on execution by plaintiff in attachment, the latter can show, in mitigation of damages for wrongful attachment, the sale on execution and application of proceeds on the judgment.—Wade v. Ray, Okla., 168 Pac. 447.

3. **Attorney and Client**—Burden of Proof.—Suit being for reasonable value of plaintiff's services as attorney, it was incumbent upon him to show what services he performed.—Ives v. Lessing, Ariz., 168 Pac. 506.

4.——Misconduct.—An attorney, who solicits funds from the credulous and uninformed to investigate claims of heirs to property, knowing there is no hope of success and that all his theories have been adversely disposed of by the courts, will be disbarred for misconduct.—In re Gridley, N. Y., 167 N. Y. S. 107.

5. **Bankruptcy** — Allowance to Trustee. — Where receiver in bankruptcy took possession of chattels subject to mortgage, amount of which exceeded their value, and property was subsequently disposed of by trustee, trustee is entitled to allowances for taxes paid and expenses in preserving property.—C. B. Norton Jewelry Co. v. Hinds, U. S. C. C. A., 245 Fed. 341.

6.——Claim.—Where claims of several petitioners to reclaim goods were separated, it was not an abuse of discretion for referee in bankruptcy to hear together several petitions for reclamation.—In re Aronson, U. S. D. C., 245 Fed. 207.

7.——Concealing Assets.—There was a concealment of property constituting an act of bankruptcy, where debtor, asked by creditor what he had done with money, said he had left it in a safe place, available on a settlement, but that he had off-sets exceeding creditor's claim.—In re Burg, U. S. D. C., 245 Fed. 173.

8.——Custody of Property.—After adjudication, receiver before appointment of trustee is not only in custody of property in his possession, but is proper person, pending appointment of trustee, to carry out orders of court made pursuant to Bankruptcy Act, July 1, 1898, § 2, subd. 15, and receiver should call to court's attention matters suggesting advisability of orders.—In re Gottlieb & Co., U. S. D. C., 245 Fed. 139.

9.——Deposit of Gold Dust.—Deposit of gold dust in bank to account of bankrupt depositor, is not transfer of money as payment or security, and does not operate to diminish estate of depositor.—American Bank of Alaska v. Johnson, U. S. C. C. A., 245 Fed. 312.

10.——Mortgage.—Though mortgagee consented, held that trustee in bankruptcy, who sold chattels subject to mortgage, is not, where it was apparent no surplus would result for benefit of general estate in bankruptcy, entitled to commissions.—C. B. Norton Jewelry Co. v. Hinds, U. S. C. C. A., 245 Fed. 341.

11.——Preference. — Where bankruptcy proceedings are instituted, bill of sale of all his property, executed by bankrupt within four months of bankruptcy, may be set aside, though intended to protect creditors.—In re Einstein, U. S. D. C., 245 Fed. 189.

12.——Preference.—Where, on foreclosure proceedings, stipulations are entered into that mortgagee take over the land as a receiver, pay off certain debts, and receive a salary, a suit by a trustee of the mortgagor, who becomes bankrupt, for an accounting under such stipulation, ratifies the entire stipulation, and payments thereunder are not preference.—McKnight v. Shadbolt, Wash., 168 Pac. 473.

13.——Set-Off.—Where depositor, who was indebted to bank, made deposit in usual course of business, bank's application of amount of deposit to its indebtedness is valid as set-off, under Bankruptcy Act, July 1, 1898, § 68a, and is not preference under § 60a.—American Bank of Alaska v. Johnson, U. S. C. C. A., 245 Fed. 312.

14. **Banks and Banking**—Contract. — Under contract by national bank to furnish funds needed in conducting business of another institution, the bank was bound to furnish reasonable sums only on proper terms and might refuse payment of overdrafts or advancements not adequately secured.—First Nat. Bank v. Humphreys, Okla., 168 Pac. 410.

15.——Dividends.—Where, contrary to statute and not in good faith, directors of bank declared

dividends out of its capital and purchased for bank its stock, diverted funds may be recovered for subsequent creditors of bank in suit against directors and sellers of stock.—Jesson v. Noyes, U. S. C. C. A., 245 Fed. 46.

16.——Imputable Notice.—Knowledge of president of national bank that funds deposited by stockman were derived from sale of cattle mortgaged to plaintiff, held not imputable to bank, so as to charge funds with trust; president and depositor being participants in scheme fraudulent, if not criminal.—Interstate Nat. Bank of Kansas City, Mo., v. Yates Center Nat. Bank, of Yates Center, Kan., U. S. C. C. A., 245 Fed. 294.

17.——Overdraft.—If a director of a trust company charged with overdrawing his account parted with the check which was certified, situation as to him was as if drawee had paid it.—State v. Scarlett, N. J., 102 Atl. 160.

18. **Bills and Notes**—Accelerating Payment.—Provision in a mortgage, securing a note payable two years after date, that on default in any interest the whole interest should become payable, related alone to a foreclosure, and did not accelerate time of payment of note, and action on note after first default was prematurely brought.—Alwood v. Harrison, Okla., 168 Pac. 440.

19.——Certificate of Deposit.—Bank's certificate of deposit, reading that A had deposited $4,950, payable to order of himself on return of certificate properly indorsed, and specifying interest payable, was negotiable instrument, being payable on demand under Thompson's Shannon's Code, § 3516a6.—Easley v. East Tennessee Nat. Bank, 198 S. W. 66.

20.——Innocent Purchaser.—Where purchaser before maturity of note paid full value therefor, that she knew that payee was indebted to others did not defeat transaction, unless she knew of fraudulent purpose to defraud creditors.—Whitney v. Day, Ore., 168 Pac. 295.

21.——Stated Account.—Debtor giving note in settlement of stated account and grossly negligent in not informing himself as to its items, could not plead as defense to action on note that certain items were fraudulently placed in the account, in absence of any artifice preventing his discovery of fraud.—Gleaton v. Georgia Nat. Bank, Ga., 93 S. E. 1023.

22. **Bridges**—Proximate Cause.— Where horse became frightened, apart from any defect in county bridge, and bystander intercepted it on bridge, causing it to wheel and fall from bridge, which had no guard rails, county was not liable, as proximate cause was nature of horse and efforts of bystander.—Corley v. Cobb County, Ga., 93 S. E. 1015.

23. **Carriers of Goods** — Stating Value. — By Act Cong. March 4, 1915, c. 176, the Cummins Amendment to Carmack Amendment to Interstate Commerce Act, interstate carriers are liable for actual loss, notwithstanding limitations of liability in receipt, contract or filed tariff, where goods are hidden by wrapping, etc., unless where they are so hidden, it requires shipper to state their value.—McCormick v. Southern Express Co., W. Va., 93 S. E. 1048.

24. **Carriers of Live Stock**—Limitation in Suit.—Provision of contract for shipment of live stock, requiring actions for damages to be brought within six months after cause of action accrued, was a bar to action for damages brought after that time.—St. Louis & S. F. R. Co. v. Taliaferro, Okla., 168 Pac. 438.

25.——Ordinary Negligence.—Where a railroad engaged to carry mules free for its contractor to do repair work to place where work was to be done, it was liable for ordinary negligence resulting in injury to mule.—Bush v. Beason, Ark., 198 S. W. 130.

26. **Carriers of Passengers**—Baggage.—Where passenger procures another's property to be carried as baggage, the carrier, without knowledge of true ownership, is a gratuitous bailee, and liable to owner only for loss or damage from its gross negligence or willful misconduct.—Lusk v. Bloch, Okla., 168 Pac. 430.

27.——Res Ipsa Loquitur.—Doctrine of res ipsa loquitur held not to apply to case of passenger injured by slipping on sill of Pullman car of latest type and in perfect repair.—Connell v. Oregon Short Line R. Co., Utah, 168 Pac. 337.

28. **Champerty and Maintenance** — Agreement to Pay Costs.—Attorney's contract for contingent compensation, whereby he is to pay entire expense, control settlement, and be jointly interested in the property recovered, held unenforceable in equity.—Jones v. Pettingill, U. S. C. C. A., 245 Fed. 269.

29.——Possession.—In action to recover part of lot encroached on by building, deed of release from defendants' predecessors, purporting to release to defendants part of lot in question, being void for champerty and made after termination of the dispossession and after filing of lis pendens, was of no service to defendants.—Belotti v. Bickhardt, N. Y., 167 N. Y. S. 19.

30. **Commerce**—Carriage of Mail.—Interstate transportation of mail held covered by the federal Employers' Liability Act, whether the railroad is acting as a common carrier in such transportation or as an agency of the government.—Zenz v. Industrial Accident Commission, Cal., 168 Pac. 364.

31.——Franchise Tax.—Ky. St., § 4077, requiring railway companies to pay franchise tax, does not use the word "franchise' in its technical sense, and the legislature did not thereby undertake to tax the right of either domestic or foreign corporations to engage in business in the state, or levy a tribute on the right of foreign corporations to engage in interstate commerce.—Baltimore & O. S. W. R. Co. v. Commonwealth, Ky., 198 S. W. 35.

32. **Constitutional Law**—Public Service Commission.—An order of the Public Service Commission that street car service must be increased, after hearing on proofs, with opportunity to street car company to appear, is not a taking of property without due process of law.—Brooklyn Heights R. Co. v. Straus, U. S. D. C., 245 Fed. 132.

33. **Contracts** — Substantial Compliance. — Where contract required water intake pipe 800 feet from shore to be buried one foot deep, dredging of ditch 12 inches deep, in which pipe was laid even with bed of lake, held not to show compliance warranting recovery by contractor.—City of Port Washington v. Thacher, U. S. C. C. A., 245 Fed. 94.

34. **Corporations**—Promoters.—Where fraud of promoters of corporation infringed corporate rights of their associates as shareholders, the corporation was a proper party plaintiff in an action against promoters to recover secret profits obtained by fraud.—Jarvis v. Great Bend Oil Co., Okla., 168 Pac. 450.

35. **Covenants**—Quiet Enjoyment. — Defendant's predecessors having paid taxes on wild lands for seven years next preceding date of deed from defendant to plaintiff, possession rested in defendant, so that his covenant for quiet enjoyment was not broken until plaintiff's possession was disturbed.—Smith v. Boynton Land & Lumber Co., Ark., 198 S. W. 107.

36. **Customs and Usages**—Violation of Policy. —Under a policy providing that, if there was any benzine on the premises, it would be void, "any usage or custom of trade or manufacture to the contrary notwithstanding." a custom of the business in using a small amount of benzine cannot be shown to excuse the violation of the policy, making it void.—Ertischek v. New Hampshire Fire Ins. Co. of Manchester, N. Y., 167 N. Y. S. 58.

37. **Damages**—Evidence.—In action for injuries at interurban railroad's crossing, it was proper and material for plaintiff to show his inability to use his leg after the accident, and showing was not necessarily objectionable because it appeared on voir dire examination that plaintiff had been subjected to another accident. —Southern Traction Co. v. Owens, Tex., 198 S. W. 150.

38.——Punitive.—In an action for alleged unlawful, willful and malicious expulsion of plaintiff from defendant lodge, punitive damages may be recovered, though no charge of fraud was made.—Little v. Henry, S. C., 93 S. E. 1008.

39. **Death**—Damages.—In action against railroad for death on track, testimony that decedent was industrious farmer, good producer and experienced scientific farmer, was admissible as bearing on question of damages to decedent's next of kin, who lived with him.—Smith v. Cleveland, C., C. & St. L. Ry. Co., Ind., 117 N. E. 534.

40.——Simultaneous.—Relative to issue of simultaneous death, or survivorship, where husband and wife were killed in collision of train with auto, evidence of better condition of health of one held admissible in connection with expert opinion of materiality of such condition.— Robson v. Lyford, Mass., 117 N. E. 621.

41. **Divorce**—Desertion.—To constitute desertion, actual withdrawal of one spouse from the other must be with intent to sever cohabitation, and protestation of lack of such intent is overthrown by persistent and inexcusable refusal for unreasonable time to resume cohabitation.— Fisher v. Fisher, W. Va., 93 S. E. 1041.

42. **Eminent Domain** — Abutting Owner. — Abutting owner is not entitled to compensation for laying out street which is absolute necessity for his use of his own lot.—Turner v. North Carolina Public Service Co., N. C., 93 S. E. 998.

43.——High Water Mark.—Condemnation of land between high and low water marks in bed of river, as part of end of public highway, is not subject to attack in injunction suit by owner of land abutting on highway above high water mark because state was not made party to condemnation by legal notice.—Hale v. Record, Okla., 168 Pac. 420.

44.——Special Damages.—The owner of land, part of which was taken for construction of a highway, could recover as special damages to the remainder the value of a well which ceased to flow owing to the blasting and excavation done upon the land taken.—Erie County v. Fridenberg, N. Y., 117 N. E. 611, 221 N. Y. 389.

45. **Estoppel**—Plat.—Where plaintiff, an owner of two lots, deeds one according to certain original plat, in action involving boundary, wherein defendants deny any agreed boundary, but claim under the deed, such plat, although later surveys shortened the block, is binding on defendants.—Boyd v. Miller, Ind., 117 N. E. 559.

46. **Ferries**—Trespass.—Landing of ferry boat at or against end of public highway is not ipso facto an injury to or a trespass upon abutting landowner's rights as owner of the fee, being subject to public easement.—Hale v. Record, Okla., 168 Pac. 420.

47. **Fraud**—Fiduciary Relation.—A party to a transaction, by pleading ignorance and inexperience and declaring her reliance on the other party, cannot impose a fiduciary obligation or status on such other party, unless consented to. —Southern Trust Co. v. Lucas, U. S. C. C. A., 245 Fed. 286.

48. **Frauds, Statute of**—Contracts.—Where decedent agreed to leave another realty on his death in return for care and nursing, neither possession of property nor making of improvements by other is requisite to take case out of statute of fraud, his services to decedent not being measurable in money.—Velikanje v. Dickman, Wash., 168 Pac. 465.

49.——Demurrer.—Where writing set out in petition in action for seller's breach of contract of sale did not make a complete contract, and agreed price was over $50, demurrer to petition on ground that contract was within statute of frauds was properly sustained.—Evans v. Atlanta Paper Co., Ga., 93 S. E. 1023.

50. **Fraudulent Conveyances**—Innocent Purchaser.—Where grantee of land in consideration of his agreement to support grantor and wife knew of grantor's debt, and that grantor was conveying to him all his property for consideration of doubtful adequacy and one deemed by law constructively fraudulent, he was not innocent purchaser, entitled in equity to compensation for improvements prior to existing creditors of grantor.—Walker v. Williamson, Ky., 198 S. W. 10.

51. **Habeas Corpus**—Appeal and Error.—Writ of habeas corpus will not issue, when the investigation will in effect be an appellate review of what has been determined by some other tribunal of competent jurisdiction, as determination by the established military tribunal of liability to draft, depending on citizenship, in the absence of arbitrary denial of rights.—United States ex rel. Troiana v. Heyburn, U. S. D. C., 245 Fed. 360.

52. **Highways**—Obstruction.—Where plaintiff, with others, had obtained a prescriptive right-of-way across land to a public highway and

there was no other egress to the public road, she was entitled to damages from the county for an obstruction of such road by the lowering of the grade of the main road.—Morgan County v. Goans, Tenn., 198 S. W. 69.

53. **Husband and Wife**—Community Property.—An automobile, bought by a wife out of her separate property on a separate property transaction, was not community property, and was not subject to attachment in an action against the husband.—Rhoades v. Lyons, Cal., 168 Pac. 385.

54.——Contract by Wife.—Wife entering into contract to buy timber and agreeing to pay stipulated price, is bound by her obligation, though on the purchase the husband's debt on prior sale of same timber to him was to be canceled.—Bateman v. Cherokee Fertilizer Co., Ga., 93 S. E. 1021.

55.——Conveyance.—Grants of rights-of-way made to county by landowners took effect as grants leading to dedication of land to public, though not signed by either of their wives, it being stipulated that they were owners of the land.—Horton v. Okanogan County, Wash., 168 Pac. 479.

56. **Indictment and Information**—Presumption.—In an indictment for murder against an infant under 14 years of age, it is not necessary to negative the presumption of his incapacity to commit the crime.—State v. Vineyard, W. Va., 93 S. E. 1034.

57. **Infants**—Compos Mentis.—To convict an infant under 14 years of homicide, it is necessary to show that he knew or understood the nature and consequence of his act and showed design and malice in its execution.—State v. Vineyard, W. Va., 93 S. E. 1034.

58. **Innkeepers**—Invitee.—Where one at defendant's hotel, by invitation of guest, in leaving took circuitous route to freight elevator, where he opened door, insecurely fastened, and fell into shaft and was killed, held there could be no recovery.—Money v. Travelers' Hotel Co., N. C., 93 S. E. 963.

59. **Insane Persons**—Conveyance.—Conveyance by woman 78 years old of about one-tenth of her property to a son in expectation that he would provide a home for her, held not evidence of incompetency requiring a guardian.—In re Watson, Cal., 168 Pac. 341.

60. **Insurance**—Changing Beneficiary.—Where insured has right to change beneficiary in life policy, and, in attempt, has met all requirements of policy or statute, except surrender of policy, which is withheld by one claiming rights, equity will deem effort made to change beneficiary sufficient.—Metropolitan Life Ins. Co. v. O'Donnell, Del., 102 Atl. 163.

61.——Concurrent Insurance.—Where insurer's agent, issuing policy, permitting concurrent insurance by agreement, knew that insured had other insurance, and without his knowledge attached a slip fixing a limit, policy might be construed or reformed to provide generally for additional concurrent insurance.—McPherson Mercantile Co. v. Reliance Ins. Co. of Philadelphia, Kan., 168 Pac. 323.

62.——Depreciated Value.—Measure of recovery under policy covering household furniture, held not the depreciation in market value or in the fair selling value in the market for any purpose to which they may be susceptible.—Haden v. Imperial Assur. Co., Mo., 198 S. W. 72.

63.——Description of Property.—Under policy of insurance covering laces, trimmings and embroideries, including samples and supplies, the word "supplies" cannot be held to cover benzine kept in violation of all policy, though it was necessarily kept to dye laces.—Ertischek v. New Hampshire Fire Ins. Co. of Manchester, N. Y., 167 N. Y. S. 58.

64.——Fraternal Society.—Beneficiary under a policy of a company organized under the life insurance laws, as distinguished from a fraternal or mutual benefit association, takes a vested interest, which cannot be impaired by act of assured, and the company without her assent.—Lloyd v. Royal Union Mut. Life Ins. Co., U. S. D. C., 245 Fed. 162.

65.——Salary of Agent.—Where insurance company agreed to pay agent $200 a month on condition he secured insurance to $50,000 during each 90 days, agent failed to perform, and made other agreement, whereby amounts were reduced to $20 per week, which were paid, in insurance company's suit against him on his notes on advances not earned, chancellor properly denied him relief on claim that $200 payments were salary.—Mutual Life Ins. Co. of New York v. Miles, Ky., 198 S. W. 30.

66. **Intoxicating Liquors**—Illegal Sale.—Purchase by defendant of 2½ gallons of wine in sealed jugs on premises of manufacturer, who made same from fruit grown on premises, held not to show violation of law, for manufacturer to sell or for defendant to purchase and have in possession under Pub. Laws 1911, c. 35, § 3, Pub. Laws 1913, c. 44, Pub Laws 1915, c. 97.—State v. Hicks, N. C., 93 S. E. 964.

67. **Landlord and Tenant**—Invitee.—Where plaintiff came on demised premises as implied invitee of tenant, who used same for a store, plaintiff cannot, having received injuries, recover from lessor on theory that, as he allowed platform in which was defective trapdoor to be used by public, he was bound to maintain it in repair.—Beaulac v. Robie, Vt., 102 Atl. 88.

68. **Libel and Slander**—Charging Crime.—Statement that plaintiff had no right to sell a piano, and that she knew it was mortgaged, held not actionable per se as charging a crime under Ky. St., § 1358, which required that the mortgage be "of record."—Sengel v. Pierson, Ky., 198 S. W. 1.

69.——Libelous per se.—Article entitled, "Misstatements of (?)," and charging untruthfulness, held libelous per se, within Rev. St. 1911, art. 5595, as exposing person to hatred, ridicule, or financial injury.—Hibdon v. Moyer, Tex., 197 S. W. 1117.

70. **Mandamus**—Banking Commissioner.—Banking commissioner's discretion must be exercised within limits prescribed by statute, and when incorporators have placed themselves within requirements of law he may be required by mandamus to approve articles of incorporation.—Speer v. Dossey, Ky., 198 S. W. 19.

71. **Master and Servant**—"Arising Out of Employment."—An employe, leaving employer's premises and injured by a fall while reaching for rail of outside storway he was descending while other employes were rushing down stairway, received an injury "arising out of his employment."—In re O'Brien, Mass., 117 N. E. 619.

72.——Course of Employment.—Bricklayer, employed by lithographing and printing company to repair wall of its plant, was engaged in employment requisite to company's business, and injury received while so doing arose out of and in course of employment carried on for pecuniary gain.—Dose v. Moehle Lithographic Co., N. Y., 117 N. E. 616, 221 N. Y. 401.

73.——Fellow Servant.—The employer is not ipso facto liable for injuries to a servant through the act of a fellow servant merely because he employs fellow servants who cannot speak the English language, but the alleged incompetency must be the proximate cause of the injury.—Barber v. Smeallie, N. Y., 117 N. E. 611, 221 N. Y. 407.

74.——Negligence.—It was inexcusable negligence for yardmaster to open switch and leave it open without a switch tender, as to gang of workmen passing through yard in motor car furnished by company, where track was apparently free of switching operations.—Thode v. Louisiana Ry. & Nav. Co., La., 76 So. 587.

75.——Negligence.—It is actionable negligence on part of master to stretch skidder cable, by which logs are being dragged from woods, close

beside and behind woodsman, who is felling timber, and thereby cut off his escape from falling timber.—Fletcher v. Ludington Lumber Co., La., 76 So. 592.

76.——Renewal of Employment.—One employed for a year at a stated salary, who continued in that service after the period, was presumed to be employed for another year, although from time to time increases were made in the salary. —Stewart Dry Goods Co. v. Hutchison, Ky., 198 S. W. 17.

77.——Simple Tool.—Sledge hammer made by employer's head smith, its handle being placed for servant to use in striking, who never had used a sledge before, equipped with a defective handle, was not a simple tool which an employer need not inspect.—Sante Fe Tie & Lumber Preserving Co. v. Collins, Tex., 198 S. W. 164.

78.——Workmen's Compensation Act. — A school teacher received an injury "arising out of the employment," within the Compensation Act, where she was injured in shoving over a heavy desk not in its accustomed place, to enable her to get a book from a case, required to facilitate her school work.—Elk Grove Union High School Dist. v. Industrial Acc. Commission of State of California, Cal., 168 Pac. 392.

79. **Mines and Minerals**—Lease.—Under oil and gas lease for five years, and so much longer as either mineral is produced in paying quantities, the production required to effectuate such extension is that which will bring a reasonably pecuniary return in excess of cost of production.—Barbour, Stedman & Co. v. Tompkins, W. Va., 93 S. E. 1038.

80. **Mortgages**—Record Title.—Where record title to dwelling place of husband and wife was in a corporation owned by the husband, a mortgagee is not called upon to investigate the rights of the wife in such property.—Houts v. First Trust & Savings Bank, Cal., 168 Pac. 383.

81.——Right of Redemption.—As a general rule, a mortgagor who has conveyed the equity of redemption by warranty deed to a third person cannot maintain a bill to redeem.—Watson v. First Nat. Bank, N. M., 168 Pac. 488.

82. **Municipal Corporations**—Abutting Owner. —One whose place of business abutted upon sidewalk was not guilty of negligence, or violation of any ordinance in piling empty chicken coops on outer side of walk while express wagon was coming to take them away.—Whittle v. Southern Express Co., La., 76 So. 623.

83.——Ordinance.—Ordinance of city council which forbids owner or agent of property to rent same to prostitute, but does not forbid him to rent his property for purposes of prostitution, is null and void.—City of New Orleans v. Piazza, La., 76 So. 598.

84.——Res Gestae.—In action for injuries in collision with automobile, court properly refused to permit plaintiff to be questioned as to what he had said concerning damage done to defendant's automobile in collision, fact only, not what plaintiff said, being material.—Townsend v. Keith, Cal., 168 Pac. 402.

85. **Navigable Waters**—Marshes. — Stream flowing through marsh or tidelands, never used or regarded as navigable except for small boats, and which it was impracticable to use without deepening it, held not a navigable stream.—North American Dredging Co. of Nevada v. Mintzer, U. S. C. C. A., 245 Fed. 297.

86. **Negligence**—Accident.—Express company whose driver while backing his wagon to sidewalk curbing struck shipper's employe while he was trying to get empty coops out of wagon's way, so that he fell against plaintiff passing on sidewalk, was not liable for plaintiff's injury.—Whittle v. Southern Express Co., La., 76 So. 623.

87.——Imputability.—Where plaintiff and owner of an automobile agreed upon a trip at joint expenses, and the automobile was struck by a train, plaintiff was a joint adventurer, and as such the negligence of the owner of the car in driving it upon the track was imputed to him.—Derrick v. Salt Lake & O. Ry. Co., Utah, 168 Pac. 335.

88. **Principal and Agent**—Counter-claim.—In action for money received by agent for the sale of automobiles, the agent cannot recover on counter-claim expenses of trips to the principal office to adjust alleged overcharges made by plaintiff.—J. W. Leavitt & Co. v. Dimick, Ore., 168 Pac. 292.

89. **Railroads**—Look and Listen.—Where one approaching railroad crossing is familiar with situation, he must use greater care as danger is greater; must, as he approaches, look from place where he can see, and listen from place where he can hear—an imperative duty so long as there is any need of its exercise.—Cathcart v. Oregon-Washington R. & Nav. Co., Ore., 168 Pac. 308.

90. **Reformation of Instruments**—Laches.—Where a deed in April, 1909, contained mistaken descriptions of property, and the grantee made some claim of ownership in 1912, or 1913, but did not attempt to take possession until July, 1914, the grantor was not guilty of laches in failing to sue for reformation of the deed until January, 1915.—Hagge v. Moran, Wyo., 168 Pac. 248.

91. **Sales**—Fraud.—Seller of jitney bus was not guilty of actionable fraud by promising buyer that if his venture should fail to be financial success it would procure contracts from individuals and firms for profitable use of car, and by failing to fulfill such agreements.—Fleming v. Gerlinger Motorcar Co., Ore., 168 Pac. 289.

92.——Guaranty. — That contract described trees as "on myrobalan roots" of itself constituted guaranty that trees sold should be grafted on myrobalan roots.—Burge v. Albany Nurseries, Cal., 168 Pac. 343.

93.——Notify Bill of Lading.—Where seller ships goods on buyer's order, "on usual terms delivered," and forwards bill of lading with draft attached, with direction to notify buyer, the title does not pass without clear proof of contrary intention of parties.—Allen & Wheeler Co. v. Farr, W. Va., 93 S. E. 1030.

94.——Speculative Contract.—Rule that, where parties knowingly enter into a speculative contract, they assume the risk, does not apply to sale of newspaper routes, in respect to continuance of publication.—Kirtley v. Perham, Cal., 168 Pac. 351.

95. **Street Railroads**—Crossing Accident.—One driving team across street railway track and having unobstructed view for quarter of mile in direction from which car came, and who attempted to cross without trying to ascertain movement of cars and was struck, was negligent.—Moses v. Northwestern Pennsylvania Ry. Co., Pa., 102 Atl. 166.

96.——Negligence of. — Where defendant's motorman knows or should know that fire automobile is coming at great speed, and runs his car out on crossing suddenly, forcing automobile to swerve to walk, injuring plaintiff, company is negligent.—King v. San Diego Electric Ry. Co., Cal., 168 Pac. 131.

97. **Trusts**—Express Trust.—When the settler, the trustee, the cestui que trust, the property transferred to the trustee, and the object to be attained, all appear with reasonable certainty from the writing, the requirements of the law are satisfied, and an express trust is thereby established.—Holsapple v. Schrontz, Ind., 117 N. E. 547.

98. **Vendor and Purchaser**—Evidence.—Where one is induced to purchase land by false and fraudulent representations in prospectus, letters and orally, it is not proper to admit parts of prospectuses having no relation to false representations relied upon. Berrendo Irrigated Farms Co. v. Jacobs, N. M., 168 Pac. 483.

99.——Executory Contract.—Where purchaser fails to perform his executory contract, and vendor is not in default, purchaser cannot recover money or property advanced, nor obtain affirmative relief as to cancellation of mortgage given on other land to secure part of consideration.—Kershaw v. Hurtt, Okla., 168 Pac. 202.

100. **War**—Alien.—Where employe was killed prior to war by United States against Germany, and deceased's mother was an alien, resident in Austria-Hungary, to which declaration of war had not been extended, appeal from a judgment dismissing her action will not be dismissed on ground that she was an alien enemy. —Taylor v. Albion Lumber Co., Cal., 168 Pac. 348.